

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY HORAN,)	CIVIL ACTION
)	
v.)	
)	
WILLIAM WARD, et al.)	No. 00-2836

MEMORANDUM

Padova, J.

March , 2001

Petitioner Jeffrey Horan filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254(a). Petitioner asserts that his trial counsel provided constitutionally ineffective assistance by failing to object to the prosecutor's use of a Biblical reference¹ during closing argument. In accordance with 28 U.S.C. § 636(b)(1)(B) and Local Rule of Civil Procedure 72.1, this Court referred the Petition to United States Magistrate Judge Jacob P. Hart for a Report and Recommendation ("Report"). On December 11, 2000, Magistrate Judge Hart filed a Report recommending that the Petition be denied. Petitioner filed three objections to the Magistrate Judge's Report, and the Commonwealth filed a response. Having conducted an independent de novo review of the Report, state court record, Petition, Petitioner's Objections, and the Commonwealth's

¹In reference to the delay in coming forward of the sole eyewitness who could positively identify Petitioner as the killer, the prosecutor said:

Well, Ladies and Gentlemen, I think all of you know that people who are scared can deny things even though they know them. Even Peter the Apostle denied the truth that he knew three times because of fear. There's no reason to say because someone doesn't want to tell the police what they know that they don't know what they are talking about.

(N.T., May 4, 1994, at 118.)

responses thereto, the Court will overrule Petitioner's objections, adopt Judge Hart's Report, and deny the Petition.

I. Standard of Review

Where a habeas petition has been referred to a magistrate judge for a report and recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. . . . [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C.A. § 636(b) (West 1993).

The instant Petition is governed by 28 U.S.C. § 2254, which provides in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . .

28 U.S.C.A. § 2254(d)(1) (West Supp. 2000). To obtain federal habeas relief, a petitioner must demonstrate his case satisfies the condition set by § 2254(d)(1). Williams v. Taylor, 529 U.S. 362, 403 (2000). The "contrary to" and "unreasonable application" clauses are properly accorded independent meaning. Id. at 405.

A state court decision can be "contrary to" the United States Supreme Court's clearly established precedent in two ways: (1) if the state court arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law; or (2) if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at an opposite result. Id. at 405 (citing Green v. French, 143 F.3d 865, 869-70 (4th Cir. 1998)).

On the other hand, a state court decision that applies the correct legal rule from the United States Supreme Court precedent to the facts of a prisoner's case does not fit comfortably within the "contrary to" clause. Id. at 406. A state court decision can involve an "unreasonable application" of the Supreme Court's precedent if the state court identifies the correct governing legal rule but unreasonably applies it to the facts of the particular state prisoner's case, or if a state court decision extends a legal principle from Supreme Court precedent to a new context where it should not apply, or unreasonably refuses to extend the principle to a new context where it should apply. Id. at 407. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. Id. at 409. The federal habeas court should not grant the petition unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent. Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 890 (3d Cir. 1999). Mere disagreement with the state court's conclusions is not enough to warrant habeas relief under the "unreasonable application" clause. Id.

II. Discussion²

Petitioner raises three objections to Magistrate Judge Hart's Report. For the reasons that follow, the Court overrules each of Petitioner's objections. The Court will consider each objection in turn.

²The Report accurately states the procedural and factual background of Petitioner's case. The Court, therefore, will not restate this background here.

A. Harmless Error (Darden v. Wainwright)

Petitioner first asserts that Magistrate Judge Hart “erred in concluding that the state court’s determination, that the prosecutor’s use in closing argument of a Biblical analogy . . . was not contrary to or involved an unreasonable application of clearly established Federal Law, as determined by the Supreme Court of the United States.” (Pet.’s Objections at 1.) The Court overrules this objection.

The state court did not specifically conclude that the prosecutor’s statement constituted harmless error in the context of the claim underlying the ineffective assistance claim. However, the state court did conclude that the failure to object to the prosecutor’s remark, in the context of the ineffective assistance of counsel claim, constituted harmless error.³ Commonwealth v. Horan, No. 2825 Phila. 1997, slip op. at 14 (Pa. Super. Ct. Dec. 1, 1998). Setting forth the rule in Darden v. Wainwright, 477 U.S. 168 (1985), Magistrate Judge Hart determined that the state court’s conclusion was not contrary to or an unreasonable application of the Darden standard. (Mag. Report at 8.) Magistrate Judge Hart also observed, “Even if that [underlying] claim had been raised, . . . the Supreme Court precedent would not have permitted a federal habeas court to override an unfavorable state court decision on this issue.” (Id. at 7.)

Under Darden v. Wainwright, the court must examine the misconduct – in this case, the Biblical remark – to determine whether it “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” 477 U.S. 168, 181 (1985). Considering the reference in the context of the entire closing argument, and considering the trial judge’s further instructions

³Petitioner’s second objection also relates to the state court’s harmless error conclusion in the context of the Strickland v. Washington ineffective assistance of counsel standard.

to the jury, the Court concurs that a harmless error finding would not be contrary to or an unreasonable application of the rule in Darden.

In this case, the Magistrate Judge reviewed the underlying claim to the asserted ineffective assistance of counsel, even though the substantive underlying claim was not raised in the state system and is therefore defaulted. The Court recognizes that, because the underlying claim is not part of this habeas Petition, it was not necessary to reach this issue in order to resolve the Petition. Nevertheless, the Court adopts the Magistrate Judge's conclusion as to harmless error. The Court overrules Petitioner's objection.

B. Harmless Error (Strickland v. Washington)

Petitioner next objects that Magistrate Judge Hart "erred in finding that Strickland v. Washington . . . was not unreasonably applied by the Pennsylvania Superior Court, when it found the prosecutor's use of a Biblical analogy to buttress the testimony of its sole eyewitness, . . . to be harmless." (Pet.'s Objections at 2.) The Court overrules this objection.⁴

Claims of ineffective assistance of counsel are governed by the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). In order to obtain a reversal of a conviction on the

⁴Petitioner's objection pertains only to the harmless error finding of the two-part Strickland inquiry. The Magistrate Judge also concluded that it was not unreasonable for the Superior Court majority to conclude that Petitioner's counsel did not err, in the context of the ineffectiveness of counsel standard, by failing to object. The Court agrees. The Pennsylvania Supreme Court's most clear articulation against prosecutors' use of biblical references applied only to the penalty phase of a capital case. See Commonwealth v. Chambers, 599 A.2d 630, 644 (Pa. 1991) ("We now admonish all prosecutors that reliance in any manner upon the Bible or any other religious writing in support of the imposition of a penalty of death is reversible error per se . . ."). Neither does the First Circuit opinion of United States v. Giry, 818 F.2d 120, 133 (1st Cir. 1987), mandate a different conclusion. The statement in Giry arose in an arguably distinguishable context, and the decision constituted precedent that was non-binding in Pennsylvania. Thus, the state court was not unreasonable in determining that counsel's failure to object did not constitute ineffective assistance.

ground that counsel was ineffective, the defendant must establish: (1) that counsel's performance fell well below an objective standard of reasonableness; and (2) that counsel's deficient performance prejudiced the defendant, resulting in an unreliable or fundamentally unfair outcome of the proceeding. Id. at 687. Counsel cannot be ineffective for failing to raise meritless claims. Mahony v. Vaughn, Civ. Act. No. 00-606, 2001 U.S. Dist. LEXIS 428, at *6 (E.D. Pa. Jan. 19, 2001). Strickland imposes a "highly demanding" standard upon a petitioner to prove the "gross incompetence" of his counsel. Kimmelman v. Morrison, 477 U.S. 365, 382 (1986).

The state court first concluded that counsel did not err by failing to object to the reference. Commonwealth v. Horan, No. 2825 Phila. 1997, slip op. at 13-14 (Pa. Super. Ct. Dec. 1, 1998). Though this conclusion would have been a sufficient basis to deny Petitioner's claim, the majority went on to explain, "We agree with the PCRA [Post-Conviction Relief Act] court, . . . that even if we were to find that counsel should have objected, we would find the failure to object harmless error. The analogy was but one sentence in a 20-page closing argument, and was followed by the trial court's explicit instructions that a prosecutor's comments are not evidence." Commonwealth v. Horan, No. 2825 Phila. 1997, slip op. at 14 (Pa. Super. Ct. Dec. 1, 1998).

This Court cannot conclude that the state court's harmless error determination was an unreasonable application of Strickland. Considering the reference in the context of the entire prosecutorial summation and taking into account the jury instructions to the effect that closing arguments are not evidence, it would be objectively reasonable for a court to determine that the failure to object would constitute harmless error. The state's conclusion of harmless error is not an outcome that could not be justified under applicable Supreme Court precedent, and therefore the state court's finding was not an unreasonable application of that federal law. The Court overrules

this objection.

C. Direct Constitutional Claims

Finally, Petitioner asserts that Magistrate Judge Hart “erred in concluding that Mr. Horan did not raise a direct claim that his constitutional rights were violated by the prosecutor’s remark.” (Pet.’s Objections at 2.) Petitioner’s submissions, however, indicate unequivocally that he brought a single habeas claim alleging ineffective assistance of counsel for failing to object. See Pet. at 9 (listing single ground of ineffective assistance of counsel); Am. Pet. ¶18 (“Petitioner, Jeffrey Horan, files this Habeas Corpus petition raising one issue: Trial counsel was ineffective for failing to object to prosecutorial misconduct during the district attorney’s closing argument,”)⁵; see also Petition at 6 (listing single ground raised in PCRA petition as ineffective assistance of counsel for failing to object). The Court overrules this objection.

III. Conclusion

For the above reasons, the Court overrules the Petitioner’s objections, and approves and adopts the Magistrate Judge’s Report and Recommendation in its entirety. An appropriate Order follows.

⁵This very clear statement is followed by a paragraph that alleges “this improper conduct by the prosecutor deprived Mr. Horan of his right to a fair trial, and his rights under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.” (Pet.’s Obj. at 2 (citing Am. Pet. ¶ 19.)) Petitioner contends that this later statement states a separate ground for his habeas review. However, this sentence is an explanation of the underlying ground for the ineffectiveness claim, rather than an attempt to assert a separate habeas claim.

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CIVIL ACTION

No. 00-2836

ORDER

AND NOW, this day of March, 2001, upon careful and independent consideration of the petition for writ of habeas corpus, after review of the Report and Recommendation of United States Magistrate Judge Jacob P. Hart, and in consideration of Petitioner's Objections to the Magistrate Judge's Report and Recommendation, **IT IS HEREBY ORDERED** that:

1. Petitioner's Objections to the Report and Recommendation are **OVERRULED**;
2. The Report and Recommendation is **APPROVED** and **ADOPTED**;
3. The petition for writ of habeas corpus is **DENIED**;
4. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

John R. Padova, J.